

No. 44137-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Detention of:

MORGAN HEATH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. Repeated instances of juror misconduct denied Mr. Heath a fair trial.

At trial, the State allowed “we have jurors that have not strictly followed the court’s order.” 10/12/12 RP 351. Yet, on appeal, the State refuses to acknowledge even that. Instead, the State accuses Mr. Heath of misstating or overstating the record.

For example the State says Mr. Heath “assumes that the jurors lied.” Brief of Respondent at 14. But this is not merely an “assumption.” The trial court itself recognized that jurors lied. When each of answered “no” to each of the court’s questions, defense counsel remarked “someone is not telling the truth.” 10/12/12 RP 334. The Court responded “I know.” *Id.* Thus, Mr. Heath is not merely assuming misconduct, but is relying on the trial court’s own recognition that jurors lied. That is juror misconduct. *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 159, 776 P.2d 676 (1989).

Next the State makes the fantastic claim that when a juror shares information she learned from a source other than the evidence offered at trial, that information is not “extrinsic.” Brief of Respondent at 16-17. “Extrinsic” means

1a : not forming part of or belonging to a thing : EXTRANEOUS

b : originating from or on the outside; *especially* : originating outside a part and acting upon the part as a whole <*extrinsic* muscles of the tongue>
2: EXTERNAL

<http://www.merriam-webster.com/dictionary/extrinsic>. Plainly

information which comes from a source other than the evidence admitted at trial is “external” to that evidence and not “part of or belonging to” that evidence. There is no question that Juror 11 found information about Mr. Heath from a source other than the evidence and shared that information with other jurors. That is extrinsic evidence. A jury commits misconduct when it considers extrinsic evidence. *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994) (quoting *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990)).

Jury misconduct is presumed prejudicial. *State v. Boling*, 131 Wn. App. 329, 333, 127 P.3d 740 (2006). To overcome that presumption the State must prove beyond a reasonable doubt that the misconduct, objectively viewed, could not have affected the jury’s verdict. *Id.* (citing *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983)).

The State contends the there was no possibility the evidence “could have affected the jury’s verdict.” Brief of Respondent at 17-18.

The State focuses primarily on the fact that the trial court reinstructed the jury regarding their duties. *Id.* at 18. And then argues jurors are presumed to follow instructions. *Id.* at 18-19. That simply ignores that these are the same jurors who willfully ignored the trial courts initial instructions and then lied to the court about their actions. These are the same jurors who disregarded the court's instructions regarding deliberations and instead discussed witness credibility during the trial. It is illogical to attach any presumption of propriety in the face of such misconduct. The State has not met its burden of proving the misconduct was harmless.

2. Mr. Heath was denied his right to a unanimous jury.

In re the Detention of Halgren, 156 Wn.2d 795, 132 P.3d 714 (2006), the Court concluded the unanimity requirements announced in *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), apply to RCW 71.09 proceedings. *Halgren* makes two things clear. First, the Court held that unanimity rules apply to 71.09 proceedings. *Halgren*, 156 Wn.2d at 720 (“[g]iven that the ultimate due process concern is in ensuring that the jury unanimously agrees on the basis for confinement, we hold that unanimity rules are applicable in SVP cases”). Second the Court made clear that “mental abnormality” and “personality disorder”

are alternative means. *Halgren*, 156 Wn.2d at 810. This Court recently reaffirmed this second point. *In re the Detention of Leck*, __ Wn. App. __, 2013 WL 4744678 (2013).

When the State alleges a defendant has committed a crime by alternative means, the right to a unanimous jury is offended unless the State elects the means upon which it is relying or the jury is instructed that it must unanimously agree on a single means. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *Petrich*, 101 Wn.2d at 569). Where neither of these options is met, reversal is required unless the evidence supporting each alternative is sufficient to support the conviction. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707–08, 881 P.2d 231 (1994); *Halgren*, 156 Wn.2d at 809.

It is undisputed that neither option was followed here. The State alleged both alternatives, and objected to Mr. Heath's request for a unanimity instruction. The court did not give the requested unanimity instruction. Thus, reversal is required unless there is sufficient evidence of each alternative. *Halgren*, 156 Wn.2d at 809.

This Court has recently held "Under RAP 18.9(a), we may impose sanctions on counsel who violate court rules. RPC 3.3(a)(1) prohibits a lawyer from knowingly making "a false statement of fact or

law to a tribunal.”” *In re Welfare of R.H.*, __ Wn. App. __, 2013 WL 4746897 (2013). Here, the State contends Mr. Heath “dos not argue that there was not substantial evidence to support either alternative means.” Brief of Respondent. Either the State did not bother to read Mr. Heath’s brief or it has elected to purposefully misstate the brief’s contents. On page 12 of Mr. Heath’s brief is an argument that begins with the subheading:

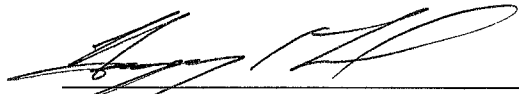
“Because the State did not offer sufficient evidence to support each alternative means, Mr. Heath’s commitment must be reversed.”

Brief of Appellant at 12. And as that subheading suggests, Mr. Heath specifically argued that there was insufficient evidence to support any conclusion that a personality disorder made him likely to reoffend. *Id.* The State may choose to ignore that argument if it wishes, but it something altogether different to affirmatively misstate the content of Mr. Heath’s brief.

B. CONCLUSION

The jury's misconduct deprived Mr. Heath of a fair trial. Further, the failure to ensure the unanimity of the jury's verdict requires a new trial.

Respectfully submitted this 23rd day of September, 2013.

A handwritten signature in black ink, appearing to read 'Gregory C. Link', is written over a horizontal line.

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SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF SEPTEMBER, 2013.

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